Re Mohana Sundari d/o M Subramaniam; ex p United Prime Corp Bhd

HIGH COURT (KUALA LUMPUR) — BANKRUPTCY NO D3–43–1835 OF 1988
ZULKEFLI J
19 DECEMBER 2003

Bankruptcy — Discharge — Application — Factors to be considered — Whether increase in monthly instalments oppressive — Whether amount of the debt still owing is a factor

This was an appeal by the judgment debtor against the decision of the senior assistant registrar ('the SAR') in making an order for conditional discharge of the the judgment debtor subject to the following conditions: (a) that the judgment debtor consented to judgment being entered in favour of the Official Assignee against the judgment debtor for the balance of the provable debts pursuant to s 33(10) of the Bankruptcy Act 1967; (b) that the judgment debtor pays an increased amount from RM250 to RM300 every month to the Official Assignee until judgment debtor reaches the age of 65; and (c) that the judgment debtor submitted an income and expenditure statement every six months to the Official Assignee. As to the circumstances that have led her into bankruptcy, the judgment debtor was asked by her father to sign the guarantees when she was only 25 years old. Though registered as directors of their father's company, the judgment debtor and her siblings had no control over the management and affairs of the company. Control of the company rested primarily with their father who, in particular handled all matters relating to money and finance. To-date, the judgment debtor had endured almost 14 years of bankruptcy.

Held, setting aside the order for conditional discharge:

(1) Some guidance can be found in the principles to be applied in considering the application for an order of discharge in the Bankruptcy Act 1967, ss 33(3) and (4) read together with sub-s (6). The fact that there is a provision in the Act which allows a discharge from bankruptcy itself shows it is intended that a bankrupt have some form of relief. Further, the provision of the new s 33A of the Act allows a bankrupt to apply to the Official Assignee directly to obtain his discharge after only five years of being a bankrupt. It would appear that if a bankrupt is not guilty or in breach of any of the matters mentioned in the subsections, then the court is empowered to discharge the bankrupt unconditionally taking into account the facts and circumstances of the case (see paras 6, 8).

(2) The conditions imposed by the learned SAR in requiring the judgment debtor to increase her monthly instalments until the age of 65, was onerous, oppressive and unconscionable in the circumstances of the case, without first conducting an investigation into the affairs of the judgment debtor to determine if the judgment debtor was in a position to comply with the order. The judgment debtor's monthly income of RM500 was definitely not sufficient to justify such an increase. When a bankrupt applies to court for a discharge from bankruptcy, the court should take into account and consider the following factors: (a) the report of the Official Assignee as to the bankrupt's conduct and affairs including the bankrupt's conduct

at the time of the bankruptcy proceedings; and (b) the cause of the bankrupt's insolvency, the bankrupt's conduct relevant to his bankruptcy, the conduct of the bankrupt subsequent to his insolvency, interests of the public at large and commercial morality (see paras 10–11).

(3) The amount of the debt still owing to the creditor is not a factor which the court should place too much reliance on when considering an application to be discharged from bankruptcy. As the Act does not stipulate an upper limit beyond which discharge is barred, the fact that the debt owed by the judgment debtor was a big one should not be given too much weight if any at all. Another factor which was altogether not to be taken into account was the fact of whether or not the bankrupt was in a position to afford and continue paying the monthly instalments (see paras 16–18).

[**Bahasa Malaysia summary**

Ini adalah rayuan oleh penghutang penghakiman terhadap keputusan penolong kanan pendaftar ('PKP') dalam membuat satu perintah untuk pelepasan bersyarat penghutang penghakiman tertakluk kepada syarat-syarat berikut: (a) bahawa penghutang penghakiman bersetuju dengan penghakiman yang menyebelahi Pegawai Pemegang Harta terhadap penghutang penghakiman untuk baki hutang yang boleh dibuktikan menurut s 33(10) Akta Kebankrapan 1967 ('Akta tersebut'); (b) bahawa penghutang penghakiman membayar jumlah yang bertambah daripada RM250 kepada RM300 setiap bulan kepada Pegawai Pemegang Harta sehingga penghutang penghakiman mencapai umur 65; dan (c) bahawa penghutang penghakiman mengemukakan satu penyata pendapatan dan perbelanjaan setiap enam bulan kepada Pegawai Pemegang Harta. Berhubung keadaan yang telah menjadikan beliau bankrap, penghutang penghakiman telah diminta oleh bapanya untuk menandatangani surat jaminan semasa beliau hanya berumur 25 tahun. Walaupun didaftarkan sebagai pengarah-pengarah kepada syarikat bapanya, penghutang penghakiman dan adik-beradiknya tiada kawalan ke atas penyenggaraan dan urusan-urusan syarikat tersebut. Kawalan syarikat tersebut terletak sepenuhnya dengan bapa mereka yang, terutamanya mengendalikan semua perkara berkaitan dengan pengurusan wang. Sehingga kini, penghutang penghakiman telah menjadi seorang bankrap hampir 14 tahun.

Diputuskan, menolak perintah untuk pelepasan bersyarat:

(1) Sedikit panduan boleh didapati dalam prinsip-prinsip yang digunakan apabila menimbangkan permohonan untuk satu perintah pelepasan dalam Akta tersebut, ss 33(3) dan (4) dibaca bersama sub-s (6). Fakta bahawa terdapat satu peruntukan dalam Akta tersebut yang membenarkan seorang bankrap mempunyai sejenis relif. Tambahan pula, peruntukan s 33A yang baru dalam Akta tersebut membenarkan seorang bankrap memohon kepada Pegawai Pemegang Harta secara langsung untuk mendapatkan pelepasannya hanya selepas lima tahun menjadi seorang bankrap. Ia kelihatan bahawa jika seorang bankrap itu tidak bersalah atau melanggar apa-apa perkara yang disebutkan dalam subseksyen tersebut, maka mahkamah mempunyai kuasa untuk melepaskan seorang bankrap tersebut tanpa syarat dengan mengambilkira fakta-fakta dan keadaan-keadaan kes (lihat perenggan-perenggan 6, 8).

(2) Syarat-syarat yang dikenakan oleh PKP yang bijaksana yang menghendaki penghutang penghakiman menambah bayaran ansuran bulanan beliau sehingga umur 65, adalah berat, menindas dan tidak dipatuhi dalam keadaan kes, tanpa terlebih dahulu mengendalikan satu siasatan kedalam urusan-urusan penghutang penghakiman bagi menentukan jika penghutang penghakiman dalam kedudukan untuk mematuhi perintah tersebut. Pendapatan bulanan penghutang penghakiman sebanyak RM500 sememangnya tidak mencukupi untuk menjustifikasikan satu penambahan. Apabila seorang bankrap memohon ke mahkamah untuk satu pelepasan daripada kebankrapan, mahkamah hendaklah mengambilkira dan menimbangkan faktor-faktor berikut: (a) laporan Pegawai Pemegang Harta berkaitan perbuatan dan urusan-urusan semasa prosiding kebankrapan; dan (b) sebab ketaksolvenan si bankrap, perbuatan si bankrap yang berkaitan dengan kebankrapannya, perlakuan si bankrap selepas ketaksolvenan beliau, kepentingan awam secara keseluruhannya dan moral masyarakat (lihat perenggan-perenggan 10–11).

(3) Jumlah hutang yang masih terhutang kepada pemiutang bukan satu faktor yang mahkamah perlu bergantung sangat apabila menimbangkan satu permohonan untuk pelepaskan kebankrapan. Memandangkan Akta tersebut tidak menetapkan batasan yang lebih tinggi yang mana pelepasan tersebut disekat, fakta bahawa hutang yang perlu dibayar oleh penghutang penghakiman adalah jumlah yang besar tidak perlu diberi penekanan jika adapun. Satu lagi faktor yang sama sekali tidak diambilkira adalah fakta sama ada atau tidak seorang bankrap itu dalam kedudukan yang mampu untuk meneruskan pembayaran ansuran bulanan tersebut (lihat perenggan-perenggan 16–18).]

Notes

For cases on application for discharge of bankruptcy, see 1 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 2089–2098.

Cases referred to

Hawkins, Re; Ex parte Official Receiver [1892] 1 QB 890 (refd)
Ng Kok Wah v UMW Industries (1985) Sdn Bhd [1995] 2 CLJ 284 (refd)
Ng Lai Wat, Re [1996] 2 SLR 106 (refd)
Reilly, Re; ex p The Debtor (1979) 23 ALR 375 (refd)
Siah Ooi Choe, Re; ex p Hongkong and Shanghai Banking Corporation [1998] SLR 903 (refd)

Legislation referred to

Bankruptcy Act 1967 s 33(3), (4), (6), (8), (10), 33A
Penal Code ss 421, 422, 423, 424

Leonard D'Cruz (Sri Ram & Co) for appellant/judgment debtor.
SY Liew (Nordin Torji & Yussof Ahmad) for the respondent/judgment creditor.
Yusnita for the official assignee.

Zulkefli J:

[1] This is an appeal by the judgment debtor against the decision of the senior assistant registrar ('the SAR') in making an order that the judgment debtor be discharged from bankruptcy subject to the following conditions ('the order for conditional discharge'):

(a) that the judgment debtor consents to judgment being entered in favour of the Official Assignee against the judgment debtor for the balance of the provable debts pursuant to s 33(10) of the Bankruptcy Act 1967 ('the Act');

(b) that the judgment debtor pays an increased amount of RM300 every month to the Official Assignee on or before the seventh of each month to begin from November 2002 until judgment debtor reaches the age of 65; and

(c) that the judgment debtor submits an income and expenditure statement every six months to the Official Assignee.

[2] The said order for conditional discharge was made by the learned SAR at the hearing of the application for an order of discharge filed by the judgment debtor as a bankrupt.

The scheme for an order of discharge under the provisions of the Act

[3] Section 33(1) of the Act reads as follows:

> A bankrupt may at any time after being adjudged bankrupt apply to the Court for an order of discharge and the Court shall appoint a day for hearing the application.

[4] As to the principles to be applied in considering the application for an order of discharge, quite apart from case law which will be dealt with later in this judgment, the Act does provide some guidance and this is reflected in the provisions of ss 33(3) and (4) read together with sub-s (6) of the same section of the Act. These provisions of the Act provide amongst others a basis under which an Order of discharge is to be considered as follows:

(i) Whether the bankrupt has committed an offence under the Act and under ss 421, 422, 423 or 424 of the Penal Code?; and

(ii) Whether the bankrupt's conduct fit into any of the categories of conduct as listed out in s 33(6) of the Act?

[5] It further follows that where it is proved to the satisfaction of the court that a bankrupt has committed any of the offence aforesaid or his conduct falls within the said list as spelt out then the court may:

(a) refuse the order; or

(b) suspend the operation of the order; or

(c) suspend the operation of the order until a dividend of not less than fifty per centum has been paid to the creditors; or

(d) grant an order of discharge subject to such conditions as aforesaid.

[6] I am of the view based on the above mentioned provisions of the Act it would appear that if a bankrupt is not guilty or in breach of any of the matters as aforesaid, then the court is empowered to discharge the bankrupt unconditionally taking into account the facts and circumstances of the case. As for the scheme and intention of Parliament in enacting these discharge

provisions under the Act, I would like to refer to the case of *Re Siah Ooi Choe; ex p Hongkong and Shanghai Banking Corporation* [1998] SLR 903 wherein his Lordship Warren LH Khoo J in examining the Singaporean equivalent to our s 33 of the Act at p 908 had this to say:

> ... the Act was designed to meet two major conflicting concerns, one stemmed from the fact that many an individual businessman become insolvent not through any fault, moral or otherwise, but through just being caught at the wrong turning of the economic cycle. It would be in the interests of society that people who had become bankrupt in such circumstances *should be given a second chance in life … . The other concern was that, without proper safeguards, people who have used dishonest and fraudulent methods in conducting their business affairs to the detriment of their creditors might get an undeserved advantage from their own wrong doings.* (Emphasis added.)

[7] I am of the view the fact that there is a provision in the Act which allows a discharge from bankruptcy itself shows it is intended that a bankrupt have some form of relief. The Act has also expressly laid down certain guidelines when considering the discharge application. These guidelines if viewed at as a whole, would tend to lean in support of the reasoning adopted by Justice Warren LH Khoo in the case cited above wherein it seeks to balance two major conflicting concerns. On the one hand, it would be undesirable to let those who become bankrupt off the hook if they have brought about their bankruptcy by dishonest business dealings, rash and extravagance in living and if they have conducted their business affairs to the detriment of their creditors. On the other hand, it would be in the interests of society and commercial morality that people who have become bankrupt through little fault of their own but by just being caught at the wrong turn of the economic cycle be given a second chance in life. This reasoning in my considered view is the true purpose, intent and scheme of the discharge provisions of the Act.

[8] A further point which goes to support the argument as aforesaid is the provision of the new s 33A of the Act. This new section allows a bankrupt to apply to the Official Assignee directly to obtain his discharge after only five years of being a bankrupt. This new section in my view is designed and enacted by Parliament in furtherance of their original intention to afford a bankrupt some relief.

The facts of the judgment debtors's case:

[9] The relevant facts in relation to the bankruptcy of the judgment debtor are as follows:

(a) following the incorporation of a company known as Percetakan Intisari Sdn Bhd ('the company') by the father of the judgment debtor on or about 4 August 1982, the judgment debtor and three of her siblings were made directors of the company;

(b) though registered as directors of the company, the judgment debtor and her siblings had no control over the management and affairs of the company. Control of the company rested primarily with their father who, in particular handled all matters relating to money and finance;

(c) the judgment debtor's father applied for and obtained various credit, hire-purchase and lease facilities for the company around the year of 1983. The judgment debtor and her siblings were asked by their father to sign guarantees in respect of these facilities;

(d) at the time the judgment debtor was asked by her father to sign the guarantees which has resulted in her bankruptcy, she was only about 25 years old and was under the direct care, control and guidance of her father as theirs was a traditional Indian family; and

(e) the judgment debtor was adjudged a bankrupt on 6 December 1989. To-date, the judgment debtor has endured almost 14 years of bankruptcy.

[10] It is my view that the conditions imposed by the learned SAR in requiring the judgment debtor to pay an increased amount from RM250 toRM300 every month until the age of 65, is onerous, oppressive and unconscionable in the circumstances of the case. It is trite law that a bankrupt must be examined as to his income and property before he is made to pay any monthly instalments to the Official Assignee. The reason being that a bankrupt must be allowed to support himself and his dependants. The cardinal rule is that a bankrupt cannot be converted into a mere slave or a personal chattel of his creditors (see the case of *Re Hawkins; Ex parte Official Receiver*[1892] 1 QB 890). In the present case when the judgment debtor applied for her discharge from bankruptcy, the SAR increased her monthly instalments from RM250 to RM300 arbitrarily without first conducting an investigation into the affairs of the judgment debtor to determine if the judgment debtor was in a position to comply with the Order. It is my finding that with the judgment debtor's monthly income of RM500. It is definitely not sufficient to justify such an increase. It is noteworthy that the judgment debtor has made an effort to satisfy her creditors by earning an honest living. It is also to be noted that on the judgment debtor's application to court for a discharge from bankruptcy, after enduring almost 14 years of the same, instead of relieving the endurance of 14 years, the SAR whilst making the order for conditional discharge ordered that the judgment debtor pay an increased amount to the Official Assignee until she reaches the age of 65. With respect to the SAR this decision is unconscionable in the circumstances of this case.

[11] Taking into account the development of the law as well as current government policy on the issue of bankruptcy, I am of the view when a bankrupt applies to court for a discharge from bankruptcy, the court should take into account and consider the following factors:

(a) the report of the Official Assignee as to the bankrupt's conduct and affairs including the bankrupt's conduct at the time of the bankruptcy proceedings; and

(b) the cause of the bankrupt's insolvency, the bankrupt's conduct relevant to his bankruptcy, the conduct of the bankrupt subsequent to his insolvency, interests of the public at large and commercial morality.

[12] In the present case, by reference to the report filed by the Official Assignee, it had been certified that the judgment debtor is not guilty of any of the matters prohibited by the Act and that the judgment debtor's conduct has been satisfactory and without fault. In other words, her conduct has been exemplary and the judgment debtor gave fullest co-operation to the authorities administering her bankruptcy. By virtue of the provision of s33(8) of the Act, the report of the Official Assignee is to be taken as prima facie proof of the matters contained therein and this evidence has not been rebutted.

[13] As to the circumstances that have led her into bankruptcy, it is clear that she was asked to sign guarantees by her father at an age of 25. Being only 25 years of age at the time, the bankrupt must have been influenced by her father into signing the guarantees. These extenuating circumstances have placed the judgment debtor in an unusually adverse position. The judgment debtor was not in control of the company and the guarantees were signed by her and her siblings at the behest of their father. This bankruptcy was effectively thrust upon the judgment debtor through little fault of her own. On this point, I would like to refer to the case of *Ng Kok Wah v UMW Industries (1985) Sdn Bhd* [1995] 2 CLJ 284. In this case, the bankrupt also signed guarantees for the benefit of his father's company. Taking into account the good conduct of the bankrupt during his bankruptcy and the circumstances that led the bankrupt into bankruptcy in the first place, his Lordship PS Gill J (as he then was), discharged the bankrupt subject to the one condition that the bankrupt consents to judgment being entered in favour of the Official Assignee for the balance of the debts provable in his bankruptcy pursuant to s 33(10) of the Bankruptcy Act 1967. In determining the bankruptcy, his Lordship dismissed the requirement that the bankrupt continues paying his monthly instalments to the Official Assignee.

Court not to impose more onerous conditions on the bankrupt when considering a discharge from bankruptcy

[14] I am of the view when considering an application to be discharged from bankruptcy, the court cannot impose more onerous conditions on a bankrupt as this would be a disincentive for a bankrupt to try and obtain his discharge. On this point, I would like to refer to a passage in the case of *ReNg Lai Wat* [1996] 2 SLR 106 wherein his Lordship Lai Siu Chiu J stated, inter alia, as follows:

> The Court should not impose conditions such that a bankrupt could not improve his position in life or make afresh start, the condition should not be a disincentive to bankrupts.

[15] Further in the case of *Re Reilly; ex p The Debtor* (1979) 23 ALR 375, it was also held, inter alia, in that case that more onerous conditions are unwarranted when considering a discharge.

Factors not to be given too much weight when considering an application to be discharged from bankruptcy

[16] I am also of the view that the amount of the debt still owing to the creditor is not a factor which the court should place too much reliance on when considering an application to be discharged from bankruptcy. In the case of *Re Siah Ooi Choe; ex p Hongkong and Shanghai Banking Corporation,* the court held on this point, inter alia, as follows:

> ... With reference to the size of the debt, the Court agreed that it was a very big one, but there was no upper limit set by the Act beyond which discharge was barred. The huge amount of debt here merely reflected the fact that a big business when it failed, tended to fail in a big way and it was in recognition of this fact that no maximum amount was stipulated in the Act.

[17] This reasoning has also been adopted in Malaysia wherein in the case of *Ng Kok Wah v UMW Industries,* the court discharged the bankrupt subject

to only one condition notwithstanding the sizeable amount of debt still owed to the creditor. In imposing that one condition, the court dismissed the requirement that the bankrupt continues to pay the monthly instalments to the Official Assignee. Based on this reasoning, I take the view that as the Act does not stipulate an upper limit beyond which discharge is barred, the fact that the debt owed by the judgment debtor is a big one should not be given too much weight if any at all.

[18] Another factor which is altogether not to be taken into account is the fact of whether or not the bankrupt is in a position to afford and continue paying the monthly instalments. Nowhere is it stated in the provisions of the Act or in the case law analysis cited hereinabove that such a factor is to be taken into account and the court should be slow in accepting such an argument.

Conclusion

[19] The judgment debtor has been a bankrupt for almost 14 years and that 14 years is a long period of penance by any measure. The judgment debtor is now currently 45 years of age and humbly desires to spend the remainder of her mortal life free from the shackles and stigma of bankruptcy that has plagued her for so many years. It is my finding that the SAR in pronouncing the said order for conditional discharge has:

(a) misdirected herself in law when she allowed the application to discharge from bankruptcy subject to more onerous conditions;

(b) taken into account and given too much weight to irrelevant factors such as the size of the debt still owing to the creditors and the judgment debtor's ability or inability to continue paying;

(c) the monthly instalments;

(d) misdirected herself in law when she increased the monthly instalments summarily without first conducting an investigation into the judgment debtor's ability to pay the same; and

(e) failed to take into account and/or given sufficient weight to pertinent factors such as the cause of the judgment debtor's bankruptcy, the exemplary conduct of the judgment debtor during the bankruptcy, commercial morality and interests of the public at large.

[20] In the circumstances of this case, an order that the judgment debtor be discharged from bankruptcy subject to only one condition, that is, the condition pursuant to s 33(10) of the Act would be the more appropriate order to be made. I therefore allowed the judgment debtors appeal and henceforth make such an order. The said order for conditional discharge made by the learned SAR is hereby set aside and there shall be no order as to costs in respect of the proceedings in this appeal.

Order for conditional discharge set aside.

Reported by Sally Kee Seok Meng